No. 84-1410

Office - Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES R. IRVING, Director, Juvenile Division,
Illinois Department of Corrections,

Petitioner,

vs.

IVIE CLAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
JILL WINE-BANKS
Solicitor General, State of Illinois
MARK L. ROTERT*
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Petitioner

TERENCE M. MADSEN
Assistant Attorney General
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 32784—45—3-18-85)

70pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure, prior to an action pursuant to 28 U.S.C. §2254, to take an appeal through a tactical, if erroneous, decision can rise to *per se* cause for procedural default or can reduce the requirement for a showing of cause based on the amount of prejudice resulting from the default.

2. Whether possible prejudice resulting from the inability to raise issues waived by a procedural default is a proper consideration on the question of whether "cause" exists to excuse the default.

3. Whether the Court of Appeals erred in addressing the allegation of cause and prejudice based on defense counsel's conduct absent a finding that the District Court abused its discretion.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE CERTIORARI:	
I.	
THE FAILURE TO TAKE AN APPEAL IS NOT, PER SE, SUFFICIENT "CAUSE" FOR PROCEDURAL DEFAULT, AND REGARDLESS OF THE PREJUDICE ALLEGED DOES NOT EXCUSE A SHOWING OF "CAUSE" TO OVERCOME WAIVER	10
II.	
THE POSSIBLE PREJUDICE RESULTING FROM THE INABILITY TO RAISE THE ISSUES WAIVED IS NOT A PROPER CONSIDERATION ON THE QUESTION OF WHETHER "CAUSE" EXISTS	11
III.	
ABSENT A FINDING OF ABUSE OF DISCRETION, IT WAS ERROR FOR THE COURT OF APPEALS TO ADDRESS THE ALLEGATION OF CAUSE AND PREJUDICE BASED ON ELSON'S CONDUCT	13
CONCLUSION	18

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit, *Clay v. Director*, 749 F.2d 427 (7th Cir. 1984) ..... App. 1

Memorandum Opinion of the United States District Court for the Northern District, *Clay v. Director*, 564 F.Supp. 206 (N.D. Ill. 1983) .. App. 21

Memorandum Opinion of the United States District Court for the Northern District, *Clay v. Director*, 570 F.Supp. 1322 (N.D. Ill. 1983) . App. 31

TABLE OF AUTHORITIES

CASES — PAGE

Bishop v. Lane, 478 F.Supp. 865 (E.D. Tenn. 1978) . 13
Clay v. Director, 749 F.2d 427 (7th Cir. 1984) .... *passim*
Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) 10, 12
Ford v. Strickland, 696 F.2d 804 (11th Cir.), *cert. denied*, 104 S.Ct. 201 (1983) 10, 11
Hodgkins v. Rose, 570 F.2d 643 (6th Cir. 1978) . 13
Huffman v. Wainwright, 651 F.2d 347 (5th Cir. 1981) 10
Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984) 11, 12

STATUTES

Ill. Rev. Stat. 1979, ch. 110, ¶72 12
28 U.S.C. §2242 13

RULE

F.R.C.P., Rule 15 13

In The

Supreme Court of the United States

October Term, 1984

JAMES R. IRVING, Director, Juvenile Division, Illinois Department of Corrections,

Petitioner,

vs.

IVIE CLAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Clay v. Director*, 749 F.2d 427 (7th Cir. 1983). A copy of the opinion is attached to this petition as Appendix A. The opinion of the United States District Court for the Northern District of Illinois is reported at *Clay v. Director*, 564 F.Supp. 206 (N.D. Ill. 1983). A copy of the order is attached to this petition as Appendix B. The supplemental opinion of the United States District Court, denying the motion for reconsideration, is reported at *Clay v. Director*, 570 F.Supp. 1322 (N.D. Ill 1983). A copy of the order is attached to this petition as Appendix C.

JURISDICTION

The Court of Appeals on November 16, 1984, reversed the District Court's grant of Director's motion for summary judgment. Director's timely filed petition for rehearing and suggestion for rehearing en banc was denied on December 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Ivie Clay ("Clay"), was sentenced to the Department of Corrections on October 26, 1977, as a result of an admission to a charge of delinquency on September 28, 1977. Clay's public defender's motion to vacate was filed on November 22, 1977, and was denied on February 24, 1978. Clay's new counsel's amended motion to vacate was filed on March 10, 1978, first heard on March 16, 1978, and denied on April 28, 1978. Clay's federal habeas corpus petition was filed on April 13, 1979. R. Doc. #1. On October 19, 1979, the District Court granted respondent's summary judgment motion, which the Court of Appeals reversed on October 1, 1980. 631 F.2d 516 (1980). After remand, the District Court denied cross-motions for summary judgment on May 25, 1982, and then on May 11, 1983, dismissed the habeas petition pursuant to respondent's summary judgment motion on the ground of waiver. On September 13, 1983, the District Court denied Clay's Rule 59(e) Motion to Alter or Amend Judgment. The Court of Appeals considered the grounds raised in the Mo-

tion to Alter or Amend and found cause and prejudice excusing the procedural default. *Clay v. Director*, 749 F.2d 427 (7th Cir. 1984).

The District Court found that Clay's habeas petition had asserted three independent grounds for relief:

> 1. Her guilty plea was involuntary because she (a) was ignorant of available defenses and (b) misunderstood the terms of her plea agreement.
>
> 2. She received inadequate representation from Assistant Public Defenders Roger Harris ("Harris") and Saul Friedman ("Friedman") both when she pleaded guilty and in connection with her motion to vacate the guilty plea.
>
> 3. Denial of the motion to vacate deprived Clay of due process because she was unconditionally entitled, according to the trial court's own representations, to withdraw her plea if her sentence did not accord with the plea agreement.

Clay v. Director, 564 F.Supp. 206, 207 (N.D. Ill. 1983).

These claims arose out of a delinquency proceeding in the Juvenile Court of Cook County in August, 1977. Clay had been arrested for aggravated assault after she had waived a knife from her second floor window at a boy who was climbing the first floor window of a vacant apartment below an apartment occupied by her family. 564 F.Supp. at 209.

An assistant public defender, Saul Friedman, was appointed to represent her. In the proceedings below, Clay alleged that she told Friedman of the events leading to her arrest, including her fear that the boy might try to set her house afire based on an earlier incident involving the same boy where gas and matches were thrown at her building. R. Doc. #56B at 4. Friedman does not recall that he interviewed any of the eyewitnesses who were at

court, or reviewed any police or probation department reports. *Id.* at 4-5. According to Clay, Friedman did not advise her of any defenses to the charge, but did tell her she would receive no more than supervision or probation if she pled guilty. *Id.* at 5. Clay asserts that she would not have pled guilty without this assurance. *Id.* Friedman does not remember anything said in any conversation with Clay. *Id.* at 10 n. 2.

At the plea hearing the State's Attorney, Linn, told Juvenile Court Judge Rogers that he and the public defender had reached an agreement. App. 49.[1] The nature of the agreement, however, was never stated in the record. The State then asked leave to amend the petition to charge assault with a knife rather than battery with a gun. *Id.* Assuming this to be the correction of a clerical error, Judge Rogers granted leave to amend. App. 50.

Clay replied affirmatively when the judge asked her whether she was entering an admission because of an agreement between her attorney and the State's Attorney. App. 53. Addressing Clay, the judge asked whether she understood that the court could "refuse to accept the agreement and enter any order which the court considers proper including commitment to the Department of Corrections?" *Id.* The judge then admonished Ivie, "but in such event, you would have the absolute right to withdraw your admission . . . ." *Id.*

---

[1] App. refers to the Appendix in the Court of Appeals. App. 48-61 are the transcripts of proceedings in the Circuit Court of Cook County, Illinois, Juvenile Division, before Judge John Rogers on September 28, 1977. App. 62-69 are proceedings before Judge Sylvester White on March 16, 1978.

Later during the hearing, and after accepting Clay's guilty plea, the judge asked, "What is the agreement?" App. 56. The State's Attorney replied that there was "no agreement as to disposition" and that he would wait for the social investigation report before making any sentencing recommendation. *Id.*

At the dispositional hearing Friedman introduced no evidence. R. Doc. #10 at 4-7. Clay was sentenced to the Department of Corrections and Friedman did not move to withdraw the plea.

On the day of the hearing Ivie Clay's mother, Ina, contacted a second attorney named John Elson who was associated with the Northwestern University Legal Clinic. 564 F.Supp. at 209. Elson testified in a deposition that he told Mrs. Clay that he was too busy to represent her daughter but agreed to contact Friedman. 564 F.Supp. at 208. He testified that he did have a phone conversation with Friedman in which Friedman agreed to file a motion to vacate. Elson also testified that Friedman called him at a later date to report on the matter and that the two spoke about the motion again during a chance encounter. 564 F.Supp. at 208, 209.

Shortly after her interview with Elson, however, Ina Clay had an interview with a clinic representative who left her with the impression that she had retained the Clinic. 564 F.Supp. at 210, n. 10. Neither Clay nor her mother were advised of any continued involvement of the Public Defender after the delinquency adjudication. 564 F.Supp. at 209, n. 7. A student at the clinic visited Ivie on several occasions discussing unrelated matters and asking about the delinquency proceeding. 564 F.Supp. at 210, n. 10.

On November 22, 1977, Friedman filed a motion to vacate, although he later testified that he had no specific grounds on which he thought the judge should have permitted Ivie to withdraw her admission, and, in fact, he did not think such a motion was warranted. R. Doc. #56B at 8. The motion was a standard form used by the Public Defender's Office. At the hearing on the motion to vacate, Clay was represented by a different public defender, Harris, who referred to Ivie as a boy and offered no argument in support of the motion which was summarily denied by Judge Rogers. App. 59.

On March 10, Elson filed a motion for leave to appear and an amended motion to vacate which asserted:

> 4. That in admitting certain of the allegations made against her, IVIE CLAY did not understand that the Court would construe such admissions as an admission of having committed a delinquent act.
>
> 5. That Respondent never intended to waive her defenses of self-defense and defense of her family from imminent life threatening harm.

564 F.Supp. at 210. At a hearing on the amended motion to vacate, Chief Juvenile Court Judge White ordered a transcript of the plea proceedings prepared at State expense. App. 67. He also set an evidentiary hearing on the amended motion to vacate for April 6, 1978. App. 68.

At the hearing, which had been rescheduled for April 28, the State's Attorney objected to the proceedings on the ground that the motion was untimely, having been filed more than thirty days after the dispositional hearing. R. Doc. #81, exh. B at 3. He also objected on the ground that the motion would be barred because the public defender's original motion to vacate had already been denied. *Id.* at 18. After rejecting Elson's arguments that Clay's public defenders' ineffectiveness justified a

hearing on the amended motion and that Judge White had already agreed to allow a hearing on the motion, Judge Rogers dismissed the motion on the grounds asserted by the State's Attorney. *Id.* at 5-18.

On April 16, 1979, Elson, in Clay's behalf, filed a federal habeas petition, which was dismissed on the State's summary judgment motion. R. Doc. #18. The Court of Appeals reversed finding that the Petition stated constitutional claims relating to an involuntary plea, ineffective assistance of counsel, and the trial judge's violation of due process in refusing to allow withdrawal of the plea in accordance with his admonition. 631 F.2d 516, 519-523. The Court also rejected the State's argument that Clay waived her constitutional claims by the failure of her new counsel, Elson, to appeal. *Id.* The Court found that there was no basis in the record on which the Appellate Court could have reversed, and "[f]or the same reason" the failure to appeal was not a deliberate bypass. *Id.* at 523.

On remand, cross-motions for summary judgment were filed based on evidence from the depositions of Clay, her mother and sister, the public defenders, Friedman and Harris, and the State's Attorney, Linn. Both motions were denied. R. Doc. #68. With respect to Clay's argument that her plea was involuntary, the District Court found that she had established that her understanding of the plea was mistaken, but not that such misunderstanding was reasonable. *Id.* According to the District Court, the Juvenile Court's promise that Clay could withdraw her plea in the event the court did not accept the plea agreement and sentenced her to the Department of Corrections was insufficient to establish the reasonableness of her mistaken belief that she would be allowed to withdraw her plea if she were sentenced to the Department of Corrections. The District Court found further that if

her mistake were unreasonable, any of her other alleged constitutional violations would be harmless error. *Id.* at 34, n. 5.

On April 23, 1983, respondent moved the District Court to reconsider its appointment of Elson because of his increasingly apparent role in the case at the time of possible procedural defaults. Petitioner vigorously opposed that motion and sought sanctions for having to respond to it. The motion was denied. R. Doc. #36, #37.

After taking Elson's deposition, over his objection, the State moved for summary judgment on the ground that Elson's failure to file an appeal for Clay from the denial of her public defender's motion to vacate waived her claims on habeas that she had received ineffective assistance on her motion to vacate. R. Doc. #80. The District Court granted the motion on the ground that Clay waived all of her constitutional claims by failing to appeal the denial of the motion to vacate. The District Court held that the Illinois Appellate Court would have heard all three of Clay's constitutional claims on the basis of new evidence supplementing the record on appeal. 564 F.Supp. at 211, n. 16. The District Court also found that Clay's decision to wait for the *de novo* hearing promised by Judge White was a "strategic decision" and not cause for her failure to appeal. *Id.* n. 17. Finally, the District Court found that its waiver finding was not precluded by the law of the case because *Engle v. Isaac*, 456 U.S. 107 (1982), and *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983) (en banc), changed the law that the Court of Appeals had applied when it rejected the State's waiver argument in its *Clay* opinion. 564 F.Supp. at 212.

In a supplementary opinion responding to Clay's Motion to Alter or Amend Judgment, the District Court found that Clay could have secured a full evidentiary hearing on her constitutional claims through an appeal because the Appellate Court would have remanded for a hearing on the motion to vacate. 570 F.Supp. at 1322. The District Court also agreed with the State's argument, first made in its response to Clay's Motion to Alter or Amend Judgment, that Clay could have obtained state review of her Constitutional claims through a motion to vacate under Ill. Rev. Stat. ch. 110, §2-1401. 570 F.Supp. at 1326. Finally, the District Court rejected Clay's request for appointment of new counsel who could argue that Elson's ineffective assistance was "cause" for her failure to appeal. 570 F.Supp. at 1326. The District Court found that Clay could not inject this new argument for the first time through a Rule 59 motion. *Id.*

The Court of Appeals agreed with the District Court that Clay had waived her claims by failure to appeal. 749 F.2d at 430. The Court, however, undertook a review of Elson's conduct and found that the procedural default was excused by ineffective assistance of counsel resulting from Elson's failure to appeal. 749 F.2d at 431. In the alternative, relying on *Ford v. Strickland*, 696 F.2d 804 (11th Cir.), *cert. denied*, 104 S.Ct. 201 (1983) and *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981), the Court held that where prejudice was great, cause will be more easily found, and then determined that prejudice was high in this case because of the combined conduct of Elson and the Public Defender. 749 F.2d at 434.

Although the Court of Appeals found that Elson had rendered ineffective assistance of constitutional dimension, Clay continues to retain him in a state civil action against Friedman and Harris. (App. to Pet. for Rehearing).

REASONS FOR GRANTING THE PETITION

I.

THE FAILURE TO TAKE AN APPEAL IS NOT, PER SE, SUFFICIENT "CAUSE" FOR PROCEDURAL DEFAULT, AND REGARDLESS OF THE PREJUDICE ALLEGED DOES NOT EXCUSE A SHOWING OF "CAUSE" TO OVERCOME WAIVER.

The Court of Appeals found that John Elson rendered constitutionally ineffective assistance of counsel by making a strategic decision not to appeal, and then determined that that ineffective assistance constituted "cause" for Clay's procedural default. *Clay v. Director*, 749 F.2d 427, 433 n. 4 (7th Cir. 1984). In the alternative, the Court held that even if the failure to appeal had not amounted to ineffective assistance of constitutional dimension, the "cause" requirement was less-than-usual in this case because of the high amount of prejudice from the failure to appeal. *Id.*

Those holdings providing mechanical satisfaction of the "cause" requirement when there is a failure to appeal, through reliance on alleged prejudice as a factor of "cause", are irreconcilable with this Court's explanation that showings of "cause" and "prejudice" are conjunctive requirements which must both be satisfied to overcome waiver resulting from procedural default. *See Engle v. Isaac*, 456 U.S. 107, 134, n. 43, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783, 804 (1982).

The Seventh Circuit's reliance on *Ford v. Strickland*, 696 F.2d 804, 817 (11th Cir.), *cert. denied*, 104 S.Ct. 201 (1983) and *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981) for propositions to the contrary is misplaced.

Huffman pre-dates the conjunctive requirement language of *Engle*. *Ford*, although post-*Engle*, merely cites *Huffman* for the proposition that "cause" to excuse a procedural default must be avoidance of a miscarriage of justice. *Ford*, *supra*, 696 F.2d at 817.

By allowing the cause requirement to be diminished with an increase in possible prejudice, the court emasculates the procedural default doctrine since any default which results in preclusion of an arguably valid claim could readily overcome the procedural bar. This Court should accept this case to determine the question of whether the prejudice from waiver of a claim alone diminishes the "cause" requirement.

II.

THE POSSIBLE PREJUDICE RESULTING FROM THE INABILITY TO RAISE THE ISSUES WAIVED IS NOT A PROPER CONSIDERATION ON THE QUESTION OF WHETHER "CAUSE" EXISTS.

The Court of Appeals also erred in incorporating consideration of the possible prejudice from the issues waived by the procedural default into the analysis of "cause" mitigating the default. 749 F.2d at 434 ("First the public defender was both unconcerned with Clay's case and incompetent.").

In *Palmes v. Wainwright*, 725 F.2d 1511 (11th Cir. 1984), the court explains that "[i]n determining whether sufficient 'cause' exists to meet the manifest injustice standard, our purpose is not to reach to the merits of the very issue barred by procedural default." *Palmes*, *supra*, 725 F.2d at 1525.

The "cause" analysis of *Palmes*, as should the analysis of the Seventh Circuit, looks *only* to the circumstances of the procedural default.

In this case, the circumstances surrounding the procedural default began when counsel filed an amended motion to vacate and ended when the period for applying for discretionary leave to appeal lapsed. The actions of neither Friedman nor Harris play *any* role in that period.

Clay's counsel did not appeal because he thought it would be futile. The belief of futility is clearly not "cause" for procedural default. *See Engle, supra,* 102 S.Ct. at 1572. To hold otherwise would render the standard meaningless in that virtually any defendant who changed his mind about the viability of the claim could meet the showing required for "cause."

A direct appeal was available to Clay. Whether Clay had been irrevocably promised leave to withdraw her plea was a matter of record. The motion to withdraw and the public defender's comments at the hearing on that motion were matters of record.

Clay did not appeal. She took the risk of seeking relief through an "amended motion to vacate" when Illinois Civil Procedure did not specifically provide for such an avenue of relief. When that motion was denied, she did not appeal. She did not seek relief under statutory corum nobis. Ill. Rev. Stat. 1979, ch. 110, ¶72.

The only question for analysis in determining "cause" in this case should have been "did the procedural default result from or in a miscarriage of justice?" Only after "cause" is found should the prejudice (in this case, the effect of the waiver of the underlying claims) be reviewed. The failure "to show 'cause' necessarily fails the conjunctive". *Palmes, supra,* 725 F.2d at 1526.

The procedural default in this case resulted from a belief in futility by an attorney in whom Clay has demonstrated steadfast confidence even to this date. The Court of Ap-

peals erred in finding "cause" based upon those circumstances merely because it believed that there was a high degree of prejudice resulting from the waiver of the underlying issues.

III.

ABSENT A FINDING OF ABUSE OF DISCRETION, IT WAS ERROR FOR THE COURT OF APPEALS TO ADDRESS THE ALLEGATION OF CAUSE AND PREJUDICE BASED ON ELSON'S CONDUCT.

On April 16, 1979, Clay, through counsel filed a Section 2254 action in the United States District Court for the Northern District of Illinois. The petition alleged ineffective assistance of counsel by one lawyer at the time of a juvenile plea and ineffective assistance of another lawyer at the time of the motion to vacate that plea. The Court of Appeals agreed with the district court that Clay committed procedural default in failing to raise these claims before the Appellate Court of Illinois.

The Court disagreed with the district court, however, on the issue of whether Clay should be allowed to amend her petition after five years of litigation to allege the ineffective assistance of yet another lawyer as the "cause" for her procedural default. The Court erred in addressing Clay's claim and in so doing allows Clay to abuse the writ of habeas corpus.

The amendment of a petition for writ of habeas corpus is governed by "the rules of procedure applicable to civil cases." 28 U.S.C. §2242. Under those rules of civil practice a federal court may allow amendment of a complaint "when justice so requires." Rule 15, F.R.C.P. This proposition has, specifically, been held to apply to Section 2254 actions. *Hodgkins v. Rose*, 570 F.2d 643 (6th Cir. 1978); *Bishop v. Lane*, 478 F.Supp. 865 (E.D. Tenn. 1978). Leave

may even be granted after final judgment. *Cf. Bishop, supra.*

The decision of whether to allow leave to amend, however, rests in the sound discretion of the trial court. *Hodgkins, supra.*

No formal motion to amend was ever filed in this case. Moreover, Elson did not withdraw, nor ever seek formal leave to do so. Nonetheless, what the Seventh Circuit has done is to allow Clay to change her claims for relief in that Court to include Elson's incompetence and then gone on to hold that his incompetence serves as the "cause" for her procedural default. In so doing, the Court allows petitioner to abuse the writ of habeas corpus.

On April 23, 1982, Director moved the District Court to reconsider the appointment of John Elson. At that time, the Director was also seeking leave to depose Elson. Although the facts known to the respondent at that time were still "sketchy," the respondent argued that a clear picture was starting to emerge.

> On September 28, 1977 petitioner entered her admission to aggravated battery in the Circuit Court of Cook County, Illinois, Juvenile Division. The admission was continued for a social report to October 26, 1977. On October 26, 1977 petitioner was ordered committed to the Illinois Department of Corrections. On December 2, 1977, Saul Friedman, Assistant Public Defender, filed a Motion to Withdraw the Admission and to Vacate the plea. That motion was denied on February 25, 1978. On March 16, 1978, well within the appeal period, the Illinois court granted the Public Defender leave to withdraw as petitioner's counsel. On that same date, Mr. John Elson filed an appearance on behalf of petitioner and filed an "*Amended Motion to Vacate Judgment.*" That motion was denied on April 28, 1978 partly on grounds

> of res judicata (i.e., the original motion was deemed res judicata). The court refused to appoint (i.e., for the purpose of fees) Mr. Elson as counsel to appeal the denial of his Amended Motion to Vacate Judgment. (See Transcript, Exh. B, attached to Motion to Reconsider Appointment of John Elson as Counsel for Petitioner.) Mr. Elson took no appeal from the denial of petitioner's Amended Motion, did not refer it to the State Appellate Defender, and, in fact, took no further action on petitioner's case until April 13, 1979 when he filed the instant Petition for Writ of Habeas Corpus.

R. Doc. 37, at 3.

On the basis of this and other information in that memorandum, the Director argued that it seemed certain that Elson would eventually become at least a witness in this action and should be removed as counsel.

In response, Clay argued

> The attorney-client privilege, however, totally protects Clay and her counsel from being forced to reveal the purported factual information. Respondent in addition has not shown how counsel's revelation of such information would prejudice Clay and thereby warrant disqualification. Finally, even if prejudice could be shown, disqualification of Clay's counsel both would not serve the ethical purposes of the Code of Professional Responsibility and would create an unwarranted hardship for Clay.

In addition, Clay alleged that the State's motion was so frivolous that sanctions were appropriate.

> Respondent's profession of concern for avoiding prejudice to Clay cannot conceal that the purpose of his motion is to deprive Clay of experienced counsel, and possibly of any counsel. Respondent's attempt to deprive Clay of counsel who is attempting to nullify a conviction that was originally obtained

> because of the alleged incompetence of counsel provided by the State, suggests that the legal representative of the State understand or deems unimportant certain basic principles of fairness.
>
> * * *
>
> Respondent's professed motivation for moving for disqualification, that of protecting Clay from the prejudice of her own counsel, is pure pretense. R. Doc. 38, at 12, 13.

At the time Clay made this decision and filed the response, she and her counsel were possessed of each and every of the historical facts which led both the district court and the Court of Appeals to conclude that she had committed procedural default through her failure to appeal.

Instead of asking for substitution at that time, she required the respondent to spend two years extracting those historical facts. It was only after a deposition of Elson on January 21, 1983, and in response to Director's motion for summary judgment in May, 1983, that Clay first showed an interest in challenging the effectiveness of assistance of the attorney whom she had engaged to challenge the effectiveness of the assistance afforded her by two prior attorneys.

For, at least, two years the court and the parties knew that the Director was attempting to gain information from Elson concerning his involvement in the state court proceedings in order to make a waiver argument. During that time, Clay opposed Director's efforts to gain information at every step.

It is an abuse of the judiciary and the writ of habeas corpus to allow Clay to seek new counsel to amend her petition to include the name of John Elson on the list of

lawyers who had "wronged" her in view of her persistent refusal to do so over the preceding two years.

Indeed, as a final indication of the reasonableness of the District Court's decision to deny Clay's request to be allowed to argue Elson's incompetence, Director asks this Court to take judicial notice of the record of *Clay v. Friedman and Harris*, 83 L 3023 (legal malpractice suit in the Circuit Court of Cook County, Illinois), where Clay continues to be represented by John Elson.

Director does not argue that any constitutional wrong should be without an available remedy. Director submits, however, that if federal courts are going to attempt to provide an effective forum for all persons who seek relief from constitutional wrongs—real and imagined—the courts must require that all persons seek their relief within correct procedural frameworks and present their claims at the earliest possible opportunity. Moreover, the courts must be ever alert for abuses of the judiciary.

This Court should intervene in this case to prevent just such an abuse.

CONCLUSION

For all of the foregoing reasons, Director asks this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit and vacate the Order of that Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
JILL WINE-BANKS
Solicitor General, State of Illinois
MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street. Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

TERENCE M. MADSEN
Assistant Attorney General
Of Counsel

* Counsel of Record

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2950

IVIE CLAY, a minor,

Petitioner-Appellant,

v.

DIRECTOR, JUVENILE DIVISION, DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 1491—Milton I. Shadur, *Judge.*

ARGUED JUNE 7, 1984—DECIDED NOVEMBER 16, 1984

Before BAUER and POSNER, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Ivie Clay appeals from the district court's grant of summary judgment for the Director of the Juvenile Division of the State of Illinois Department of Corrections and dismissal of her petition for a writ of habeas corpus, and the denial of her motion for summary judgment. For the reasons set forth below we reverse the grant of summary judgment.

I

Clay, a juvenile, was arrested for aggravated assault after she waved a knife at Jose Garcia. According to Clay's undisputed version of events, Clay was standing by the window of her second floor apartment and saw Garcia climbing into the window of the vacant apartment below. Clay had previously seen Garcia try to set fire to her apartment by throwing gasoline and a lighted match on the rear porch. Clay asked Garcia why he was climbing in the window, and Garcia responded that he was going to retrieve his ball from the first floor apartment. Clay offered to retrieve the ball for Garcia, but Garcia persisted in entering the vacant apartment. Clay then went to the kitchen for a knife. From her apartment window, she waved the knife at Garcia who was still hanging onto the window ledge of the apartment below. Garcia then joined a group of boys outside the building who began throwing rocks at Clay and her apartment. Clay then called the police. The police came and arrested Clay after Garcia told them that Clay had a gun. Clay showed the police the knife she waved at Garcia and denied owning a gun. The police searched Clay's apartment and did not find a gun.

Friedman, a public defender, was appointed to represent Clay. Clay told Friedman of the events leading up to her arrest. Although these events might have supported certain legal defenses to the charge against Clay, Friedman did not apprise Clay of the availability of any defenses. Instead, he urged her to enter into a plea agreement. Unaware of any other option, Clay followed Friedman's recommendation to plead guilty with the understanding that she would receive no more than probation or supervision if she admitted guilt.

According to the affidavits of both Friedman and the assistant state's attorney, however, the only agreement was to amend the complaint to read that the weapon used was a knife rather than a gun. Because the amendment

reflected the undisputed facts, Clay derived no benefit from the agreement.[1]

On September 28, 1977 Clay pled guilty before Cook County Circuit Judge Rogers. After Clay acknowledged that her guilty plea had been induced by a plea agreement, Judge Rogers advised Clay that the court could "refuse to accept the agreement and enter any order which the Court considers proper including commitment to the Department of Corrections." The judge further advised Clay that she had an unconditional right to withdraw her admission if the court refused to accept the agreement. *In re Clay*, No. 77 J 8657, Report of Plea Proceedings in Juvenile Court at 6 (Cook County, Ill. Cir. Ct. Sept. 28, 1977). On October 26, 1977 Judge Rogers found Clay guilty of delinquency and committed her to the Illinois Department of Corrections. *Id.* Report of Dispositional Proceedings in Juvenile Court (Oct. 26, 1977). Although the sentence represented a rejection of Clay's understanding of the plea bargain, Friedman neither moved to withdraw Clay's admission nor informed Clay of her right to do so.

Immediately after the dispositional hearing, Clay's mother telephoned Assistant Director John Elson of the Northwestern University Legal Clinic and asked for assistance. Mrs. Clay told Elson that her daughter had been promised probation in return for her guilty plea and that Friedman "had sold [Clay] down the river." Elson declined representation but called Friedman to inform him of Mrs.

---

[1] When first presented with respondent's version of the plea agreement, this court stated:

> Common sense dictates that any defendant, and particularly one with seemingly valid defenses available, would scarcely be inclined to enter an admission of guilt in return for an agreement by the State to do nothing more than amend the complaint to comport with the undisputed facts of the case, particularly a fact of no significance on the matter of guilt of aggravated assault.

Clay v. Director, 631 F.2d 516, 521 (7th Cir. 1980).

Clay's belief that her daughter had been misinformed. Friedman acknowledged to Elson that "there was a real problem with what Ivie Clay understood." Friedman assured Elson that he would file a motion to vacate Clay's plea and that he thought there would not be "a big problem with the matter."

In November 1977 Friedman filed a standard form motion to vacate which contained no specific factual allegations and no mention of Clay's understanding of the plea agreement. The federal district court found the motion "seriously deficient as a presentation of Clay's specific basis for relief." *Clay v. Director*, 564 F. Supp. 206, 208 (N.D. Ill. 1983). At the hearing on the motion to vacate, Clay was represented by another public defender who was unfamiliar with the case and who presented no argument. Neither Clay nor her mother was informed about the motion or the hearing. Judge Rogers summarily denied the motion on February 24, 1978. Report of Proceedings on Motion to Vacate in Juvenile Court (Cook County, Ill. Cir. Ct. Feb. 24, 1978).

In March 1978 Elson learned that nothing had happened on the Clay matter and changed his earlier position declining direct representation of Clay. On March 10, 1978 Elson filed a petition to substitute himself for the Public Defender's Office as Clay's counsel and an amended motion to vacate judgment. On March 16 Elson entered an appearance in the case. The amended motion did not assert ineffective assistance of the public defenders representing Clay "apparently because Elson had not yet seen the original motion to vacate or learned of the manner in which it had been presented at the February 24 hearing. Elson learned of those developments when he appeared before Judge White to argue the amended motion." *Clay v. Director, supra*, 564 F. Supp. at 210. The hearing before Judge White occurred on March 16, 1978. At that time, Judge White ordered a transcript of the plea proceedings prepared at State expense and reset the motion for April 28, 1978 before Judge Rogers. Report of Proceedings on Amended Motion to Vacate before Judge White (Cook County, Ill. Cir. Ct. March 16, 1978).

At the April 28 hearing Elson urged ineffective assistance of counsel as a basis for considering the amended motion and vacating Clay's delinquency conviction. Judge Rogers ruled that the amended motion was untimely because more than thirty days had lapsed since the order of commitment, *see* Ill. Rev. Stat. ch. 110A, § 604(d), and because res judicata principles precluded relitigation of claims that could have been raised in the first motion to vacate. Report of Proceedings on Amended Motion to Vacate in Juvenile Court (Cook County, Ill. Cir. Ct. April 28, 1978).

On April 16, 1979 Elson filed a federal habeas petition on behalf of Clay in the United States District Court for the Northern District of Illinois. The court dismissed the petition on respondent's summary judgment motion. *Clay v. Director*, No. 79 C 1491, Memorandum Opinion and Order (N.D. Ill. Oct. 18, 1979). This court reversed and remanded, finding *inter alia* (1) that Clay had not waived her constitutional claims by failing to appeal her conviction to the Illinois Appellate Court because there was no basis in the record on which the appellate court could have reversed, and (2) that Clay's failure to appeal was not fatal to her habeas claims because she did not deliberately bypass state procedures. *Clay v. Director*, *supra*, 631 F.2d at 523.

On remand the district court found that this court's opinion was not the law of the case because intervening changes in the law altered the standards for waiver. The court, applying the standards set forth in *Engle v. Isaac*, 456 U.S. 107, 128-35 (1982), and *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-61 (7th Cir. 1983) (en banc), held that Clay had waived her constitutional claims by failing to present them to the Illinois Appellate Court and that Clay had no cause for her waiver. *Clay v. Director*, *supra*, 564 F. Supp. at 210-13. On a motion for reconsideration, the district court rejected Elson's argument that Elson's ineffectiveness was cause for Clay's failure to appeal her delinquency conviction. The court found that "Clay (through her counsel, Elson) deliberate-

ly chose to proffer the futility rationale as the sole justification for her procedural default" and refused to permit injection of this "new argument into the litigation at this late date." *Clay v. Director*, 570 F. Supp. 1322, 1325 (N.D. Ill. 1983).

II

We agree with the district court that under current standards Clay must be deemed to have waived her claims by failing to present them to the Illinois Appellate Court. We find, however, that Elson's ineffectiveness is the cause for Clay's procedural default; therefore, habeas corpus relief is not barred.

In *United States ex rel. Spurlark v. Wolff, supra*, 699 F.2d at 357-61, a majority of this court held that failure to raise a claim on direct appeal from a state court conviction bars federal habeas corpus relief unless the petitioner shows cause for and prejudice from the procedural default. We find no persuasive reason for distinguishing between a failure to take an appeal and a failure to raise an issue on appeal. *Cf. United States v. Correa-deJesus*, 708 F.2d 1283, 1285 (7th Cir.) (assuming that *Spurlark* applies to case involving a complete failure to appeal), *cert. denied*, 104 S. Ct. 530 (1983). *But see Crick v. Smith*, 650 F.2d 860, 867-68 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982); *Boyer v. Patton*, 579 F.2d 284, 286 (3d Cir. 1978). *See generally Holcomb v. Murphy*, 701 F.2d 1307, 1310-12 (10th Cir.), *cert. denied*, 103 S. Ct. 3546 (1983).

Assuming that Clay is therefore required to show "cause" for failing to appeal her claims and actual "prejudice" under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), *cf. infra* at 12-13, we find these requirements satisfied. Ineffective assistance of counsel may provide sufficient cause for a procedural default. *See Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3589 (1984); *Gray v. Greer*, 707 F.2d 965, 969 n.5 (7th Cir. 1983); *Norris v. United States*, 687 F.2d 899, 903 (7th Cir. 1982) (dicta); *Sincox v. United States*, 571 F.2d 876, 879-80

(5th Cir. 1978). *But cf. Mitchell v. Hopper*, 538 F. Supp. 77, 96 (S.D. Ga. 1982) ("an allegation of ineffective assistance of counsel does not alone suffice to demonstrate 'cause' under *Sykes*"), *vacated sub nom. Spencer v. Zant*, 715 F.2d 1562 (11th Cir. 1983), *rehearing en banc granted*, 729 F.2d 1293 (11th Cir. 1984). Failure by an attorney to perfect an appeal where the client has indicated a desire to appeal amounts to ineffective assistance of counsel. *See Hollis v. United States*, 687 F.2d 257, 259 (8th Cir. 1982), *cert. denied*, 459 U.S. 1221 (1983); *Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir. 1982) (failure to file appellate brief), *cert. denied*, 103 S. Ct. 3570 (1983); *Macon v. Lash*, 458 F.2d 942, 950 (7th Cir. 1972).

Under Illinois law, to appeal from a judgment entered upon a plea of guilty, a defendant must first file in the trial court within thirty days from the date sentence is imposed a motion to withdraw the plea and to vacate the judgment. Ill. Rev. Stat. ch. 110A, § 604(d). The defendant has thirty days from the date of the entry of an order denying the motion to vacate to file a notice of appeal. *Id.* § 606(b). Illinois case law is clear that successive motions to vacate judgment do not toll the running of the appeal period. *See Deckard v. Joiner*, 44 Ill. 2d 412, 418-19, 255 N.E.2d 900, 904, *cert. denied*, 400 U.S. 941 (1970); *Cronin v. Altman*, 101 Ill. App. 3d 432, 434, 428 N.E.2d 586, 588 (2d Dist. 1981); *Slavick v. Michael Reese Hospital & Medical Center*, 92 Ill. App. 3d 161, 165, 415 N.E.2d 1060, 1062 (1st Dist. 1981).

Clay's original motion to vacate was denied on February 24, 1978. Thus, she had until March 26, 1978 to file a notice of appeal. Elson substituted as counsel for Clay on March 10, 1978. Elson had sixteen days to file a notice of appeal on behalf of Clay. The pending status of the amended motion to vacate did not, as Clay suggests, render the denial of the original motion to vacate a nonfinal, nonappealable order. Rather, the filing of an appeal would have stripped the trial court of jurisdiction to decide Clay's amended motion to vacate. *See People v. Turner*, 111 Ill. App. 3d 358, 368, 443 N.E.2d 1167, 1176

(2d Dist. 1982). The Illinois appellate courts will not dismiss an appeal based upon issues not raised in a motion to dismiss where the default is due to ineffective assistance of counsel. *Id.* But because there was only a minimal record of Clay's constitutional claims regarding her conviction, it is possible that the most she could obtain if she prevailed on appeal from the denial of her original motion to vacate was a remand to the trial court for an evidentiary hearing. *See People v. Nicewanner*, 93 Ill. App. 3d 1, 5-6, 416 N.E.2d 776, 780 (3d Dist. 1981); *People v. Bennett*, 82 Ill. App. 3d 596, 601, 403 N.E.2d 50, 55 (5th Dist. 1980). *But cf. People v. Turner, supra*, 111 Ill. App. 3d at 368-70, 443 N.E.2d at 1176 (addressing merits of defendant's claim that plea was involuntary although no motion to withdraw plea was made); *People v. Brownell*, 86 Ill. App. 3d 697, 698, 408 N.E.2d 304, 305 (2d Dist. 1980) (same). Nevertheless, an appeal from the denial of a motion to vacate is the only route for relief provided under Illinois law. Thus, this was the route that Elson was required to follow to preserve Clay's right to appeal. Alternatively, Elson could have requested an expedited hearing on the amended motion to vacate so that in the event the motion was barred he would still have had time to file a notice of appeal from the denial of the original motion to vacate.

We believe that Elson's failure to preserve Clay's appeal "fell below an objective standard of reasonableness," *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984), constituting ineffective assistance of counsel and excusing Clay's procedural default.[2] Elson's ineffectiveness clear-

[2] In a supplemental opinion, the district court held that Clay also waived her claims by failing to raise them in a so-called section 72 petition, Ill. Rev. Stat. ch. 110, § 2-1401. *Clay v. Director, supra*, 570 F. Supp. at 1326. We are persuaded by Clay's arguments that (1) this remedy was not available to her under the facts of her case, and (2) this is really a question of exhaustion of state remedies that should not bar relief since the remedy is no longer available to her, Brief of Petitioner-Appellant at 37-42. We need not decide the issue, however, because the cause for Clay's waiver, if waiver exists, is again the ineffectiveness of her counsel.

ly prejudiced Clay. We must presume that an Illinois appellate court would have responded to Clay's claims given the decisions by both this court and the district court finding that she presents allegations of serious constitutional violations, *see Clay v. Director, supra*, 631 F.2d at 519-23; No. 79 C 1491, Memorandum Opinion and Order at 2-5 (N.D. Ill. May 25, 1982). *Cf. People v. King*, 1 Ill. 2d 496, 500, 116 N.E.2d 623, 625 (1954) (per curiam) (defendant entitled to withdraw plea where agreement was based on misapprehension of law or facts, defendant has defense worthy of consideration by factfinder, or ends of justice would be better served by submitting case to factfinder); *People v. Brownell, supra*, 86 Ill. App. 3d at 700, 408 N.E.2d at 306 (defendant permitted to withdraw plea where no evidence that defendant was advised of extended term statute or that sentences on multiple charges could be imposed consecutively); *People v. Petrovich*, 77 Ill. App. 3d 737, 396 N.E.2d 629, 630-31 (2d Dist. 1979) (defendant entitled to withdraw plea where defendant's statement raised valid and substantial defenses to crime charged); *People v. Brooks*, 54 Ill. App. 3d 963, 966, 369 N.E.2d 1353, 1355 (1st Dist. 1977) (merits of defendant's case heard on appeal where defendant's misapprehension of procedural prerequisites was attributable to trial court's ambiguous directions). If, as Clay argues, the record contained insufficient evidence to either support or refute Clay's claims, we must presume that the appellate court would have remanded for a hearing.[3]

[3] We are not unsympathetic to the Hobson's choice faced by Elson. If he had filed a notice of appeal on behalf of Clay, Clay would have lost any possibility of a hearing on the amended motion to vacate. And because Illinois law limits the post-conviction remedies available to juveniles, it is not clear that Clay would have had another opportunity to present her claims to the trial court. By choosing to pursue a hearing in the trial court (which was possibly the only court in which Clay could obtain ultimate relief), Elson caused Clay to lose her right to appeal. Although we conclude that Elson could not competently make a choice for Clay that caused her to forfeit her right to appeal, we commend his concerned, vigorous, and otherwise extremely effective representation of Clay (which included raising the issue of his own ineffectiveness).

III

We cannot accept the district court's refusal to hear Clay's claim that Elson was ineffective. When waiver was first raised by respondents in their motion for summary judgment, Clay (through her attorney Elson) responded:

> [E]ven if this Court were to agree that Elson was at fault for not adequately pursuing Petitioner's ineffective assistance claim in State court, the appropriate remedy would not be the requested summary judgment. Rather, fairness to Petitioner would require that this Court appoint new counsel for her since Elson has not argued, and could not adequately argue, the possibility of his own past inadequate representation as a further basis for granting Petitioner relief.

Memorandum in Opposition to Respondents' Summary Judgment Motion on the Ground of Waiver filed March 31, 1983, at 3-4. Then, when the court indicated that waiver might present a bar to habeas relief for Clay, Elson had the following dialogue with the court:

> THE COURT: . . . [A]t this point you are confronted with the cause prejudice problem that is posed by the *Wainwright* notion. . . .
>
> MR. ELSON: . . . I am troubled by one matter. Apparently your analysis is that Ivy [sic] Clay's failure to appeal the incompetence in a motion to vacate was—
>
> THE COURT: At a time when you were plainly counsel and had time to do so.
>
> MR. ELSON: Which implicates, and this is the point I raised in my memo, implicates my competence in choosing not to appeal.
>
> THE COURT: That may be for a third lawyer to argue, but I can't really deal with that one at this stage. . . .

> MR. ELSON: I guess all I am saying is there are two sides to the coin, and if, indeed, it was a mistake to not appeal, then it was an incompetent mistake because it certainly wasn't Ivy [sic] Clay's fault. She was relying on her attorney.
>
> * * *
>
> MR. ELSON: I just want to preserve the record on that. If as a result of your ruling it is found waivered [sic], then we would, I think, on behalf of the client, ask for appointment of another counsel.
>
> THE COURT: You may want to do that. You are not doing anything on your record yet because I haven't ruled.

Transcript of Proceedings of April 15, 1983, at 3, 4, 6. We agree with Clay that by refusing to permit her to argue Elson's ineffectiveness before the court ruled because it was "premature" and after the court ruled it was "too late," the court erected an unfair procedural barrier. We therefore remand the case with instructions to permit new counsel to substitute for Elson.

IV

Even if we believe that Elson's decision to pursue a remedy for Clay in the trial court rather than to take an appeal was a strategic and reasonable choice,[4] *see Clay*

---

[4] Most courts that have addressed the issue have held that habeas petitioners are not necessarily required to establish a violation of their sixth amendment right to effective assistance of counsel to satisfy cause for a procedural default under *Wainwright v. Sykes*, *supra*. The courts generally have drawn a distinction between counsel's tactical decisions and ignorance or oversight. If the failure to object or appeal was a tactical decision by counsel, the petitioner is required to prove that counsel's representation violated the sixth amendment. If the failure was due to counsel's ignorance or oversight, a lesser showing of incompetency is required. *See Carrier v. Hutto*, 724 F.2d 396, 401 (4th Cir. 1983); *Runnels v.*

(Footnote continued on following page)

v. Director, supra, 564 F. Supp. at 211 n.17, we would feel constrained to hear Clay's constitutional claims to prevent a possible miscarriage of justice.

Although the Supreme Court has signaled a significant narrowing of the channels for habeas corpus relief, particularly in its adoption of the "cause and prejudice" requirements, the Court has continued to give assurance that the channels remain open to correct miscarriages of justice. In *Engle v. Isaac, supra*, 456 U.S. at 135, the Court stated: "In appropriate cases [the] principles [of cause and prejudice] must yield to the imperative of a fundamentally unjust incarceration." In *Wainwright v. Sykes, supra*, 433 U.S. at 91, the germinal case with respect to the cause and prejudice test, the Court admonished that "the [waiver] rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *See also Ortiz v. Duckworth*, 692 F.2d 39, 41-42 (7th Cir. 1983).

In a concurrence in *Sykes*, Justice Stevens expounded on the need for flexibility in applying the cause and prejudice test:

---

[4] *continued*

Hess, 653 F.2d 1359, 1364 (10th Cir. 1981); *Garrison v. McCarthy*, 653 F.2d 374, 378 (9th Cir. 1981); *cf. Jurek v. Estelle*, 593 F.2d 672, 683 n.19 (5th Cir. 1979) ("Of course, [attorneys] misfeasance need not amount to a denial of the defendant's constitutional right to counsel; if it did it would be an independently sufficient reason to grant relief and would make it immaterial whether other constitutional claims had been forfeited."), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

We need not address the issue raised by those cases. We hold first that Elson's failure to appeal amounted to a sixth amendment violation. *See supra* at 8-9. We hold in the alternative that a less-than-usual showing of cause is required in the instant case because Clay has been severely prejudiced. *See infra* at 14.

> [I]f the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused. Matters such as the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire proceeding, may be more significant than the language of the test the Court purports to apply. I therefore believe the Court has wisely refrained from attempting to give precise content to its "cause"-and-"prejudice" exceptions. . . .

433 U.S. at 95-96 (footnotes omitted). Two circuits, relying primarily on Justice Stevens' concurrence in *Sykes*, have given "cause" a flexible definition that may change depending on the degree of prejudice shown. *See Ford v. Strickland*, 696 F.2d 804, 817 (11th Cir.), *cert. denied*, 104 S. Ct. 201 (1983); *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir. 1981); *Sincox v. United States*, *supra*, 571 F.2d at 879-80. These courts "view cause in terms of the nature of the procedural waiver and with an eye to the possible resulting prejudice." *Huffman v. Wainwright*, *supra*, 651 F.2d at 351. Cause is defined in sufficient terms "to excuse a procedural default in light of the determination to avoid 'a miscarriage of justice.'" *Id.* Thus, if prejudice is high, cause will be more easily found. Conversely, where it appears that justice has been done, the requirement for showing both cause and prejudice will be strictly enforced. *See generally United States ex rel. Spataro v. Bosse*, No. 82 C 5547, Memorandum and Order at 5 n.1 (N.D. Ill. Jan. 10, 1984); Goodman & Sallett, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hast. L. Rev. 1683, 1722 (1979).

We adopt the approach of those circuits in the instant case. We are presented with a combination of all the "matters" listed by Justice Stevens in his concurrence. First, the public defender was both unconcerned with Clay's case and incompetent. Elson, although concerned and vigorous in his representation, also failed Clay. Second, as Clay points out, Illinois law limited the routes for

relief available to her. For example, collateral remedies provided in the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶ 122, have been held unavailable to juveniles in most circumstances. *See In re A.W.H.*, 95 Ill. App. 3d 1106, 1107, 420 N.E.2d 1041, 1042 (5th Dist. 1981); *In re R.R.*, 75 Ill. App. 3d 494, 495-96, 394 N.E.2d 75, 76-77 (2d Dist. 1979), *cert. denied*, 447 U.S. 928 (1980). Because there was little record of Clay's constitutional claims in the trial court, the most Clay could have hoped for on appeal was a remand to the trial court. Importantly, Clay was not neglecting to present her claims to the Illinois courts. Rather, she was trying to present her claims to the only court that could ultimately grant her relief. Finally, the constitutional rights at stake in this case are of fundamental importance. *See Clay v. Director*, 631 F.2d at 518-19, 523. *See generally Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) ("a waiver that takes place when a plea of guilty is entered in a state criminal trial . . . [involves] three important federal rights"). The procedural context, the incompetence of counsel, Clay's youth, and the nature of her claims combine to present a picture of overall unfairness. To prevent a miscarriage of justice, we hold that Elson's failure to take an appeal was, if nothing else, sufficient cause for Clay's procedural default.

POSNER, *Circuit Judge*, concurring. I concur in the court's result, but not in the analysis that leads to it. The key to that analysis is the proposition that Ivie Clay's second lawyer, Elson, rendered ineffective assistance of counsel as a matter of law. This proposition is untenable on its own terms, and is also inconsistent with the rule announced in *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-61 (7th Cir. 1983) (en banc), that a state criminal defendant may not seek federal habeas corpus on grounds he could have raised, but failed to raise, in an appeal to state court from his conviction.

Miss Clay pleaded guilty, almost certainly because she was incompetently represented by her first lawyer, Friedman—for she had excellent defenses, state and federal, to the charges against her. Under Illinois law, if she wanted to appeal her conviction, entered as it had been on the basis of a guilty plea, she had first to file with the trial court a motion to vacate the conviction. Friedman did file such a motion, but it was completely inadequate and was denied. It was at this point that Elson began actively representing Miss Clay. He faced a dilemma. If he appealed, he had little or no prospect of winning, because Friedman had failed to make a record substantiating the claim that the proceedings leading up to Miss Clay's conviction had been constitutionally infirm. As we said the last time this case was here (an unbelievable four years ago), "Given the general grounds in [Friedman's] motion, and the fact that no argument was presented in the trial court, there would have been no basis on which the appellate court could have reversed." 631 F.2d 516, 523 (7th Cir. 1980). The best ground for an appeal would have been Friedman's incompetent representation of Miss Clay (and if this could be shown, presumably she would be given an opportunity to repair the deficiencies in the record on her other constitutional claims); but of course Friedman had not used the motion to vacate to make the case for his own incompetence. Elson might still have been able to raise on appeal the issue of Friedman's incompetence, but without a record demonstrating it (the kind of record later made in this habeas corpus proceeding) he would not have had a decent chance of prevailing on the appeal even to the extent of getting an order for an evidentiary hearing on the issue. Elson's alternative to appealing was to file an amended motion to vacate. This was a long shot, because Illinois law makes no specific provision for such an animal; but Elson was greatly encouraged when Judge White set the matter for a hearing.

The scheduling of the amended motion for a hearing made Elson's dilemma exquisite. If he appealed from the

denial of the first motion to vacate (as he still had time to do), then under Illinois law the trial court would lose jurisdiction and Elson would lose the hearing that seemed his best shot at getting his client's conviction overturned. But if he did not appeal, the time for appeal would lapse before the hearing on his amended motion was held. He decided not to appeal, and unfortunately for him and his client the judge before whom the hearing had been set (a different judge, Judge Rogers) decided that the amended motion was procedurally improper and dismissed it out of hand. It was now too late for Elson to file an appeal from the denial of Friedman's original motion to vacate the conviction; and taking an appeal from the denial of the amended motion was unpromising since the denial (even assuming it was an appealable order, which is unclear) had been based on a procedural ground unlikely to be overturned. It was against this complicated background that Elson decided to seek federal habeas corpus without having first attempted to raise on appeal to a state court the constitutional claims that he would be asking the federal court to decide.

I do not see how Elson's conduct in the state court can be called ineffective assistance of counsel as a matter of law. He acted reasonably in the unusual circumstances in which he found himself. Only after a judge had actually scheduled a hearing on the amended motion to vacate did Elson give up what we said in 1980 would have been a futile appeal. He cannot be faulted for not having anticipated that a different judge would cancel the hearing and throw out the motion as procedurally improper. If a judge offers a lawyer a hearing on a motion, not one lawyer in a hundred will pause to question the judge's authority to grant the motion should the hearing produce evidence showing that the motion is meritorious. It is true that Illinois law makes no specific provision for an amended motion to set aside a conviction, but Elson would not have been unreasonable in thinking that Illinois judges might have implicit authority to accept an amended motion, relating back to the date of filing of the original motion, in an appropriate

case. Anyway, it was better than nothing. And there was no obvious way in which Elson could preserve both his (probably worthless) right to appeal and what seemed the much more promising option of a hearing on the amended motion to vacate the conviction. Of course with the benefit of hindsight we know he should have gone ahead and appealed, not because it would have gained him anything but because it would have complied formally with the requirement, imposed by *Spurlark*, of giving the state appellate court a chance to correct any constitutional error committed in the trial court. But the proper perspective in evaluating a claim of ineffective assistance of counsel is ex ante, not ex post. We should not make lawyers always go by the book, when an unconventional approach holds more promise for the client, as it did here. Legal imagination should not be penalized by a concept of ineffective assistance of counsel that discourages all risk-taking on a client's behalf.

Maybe with even more imagination Elson could have escaped from his dilemma. Maybe he should have moved to accelerate the hearing scheduled before Judge Rogers, or filed a late notice of appeal, or tried to appeal from Judge Rogers' order dismissing the amended motion without a hearing. But a lawyer is not ineffective just because he fails to make extraordinary efforts on his client's behalf; the constitutional standard is minimum rather than maximum compliance with the standards of the profession.

As Elson was not in fact incompetent in his efforts on behalf of Miss Clay, I am led to wonder whether my brethren may not regard *any* failure to appeal an appealable judgment (such as the order denying the original motion to vacate) as incompetence per se, no matter how reasonable it actually is in the circumstances. There are hints of this position in the majority opinion, but I hope I am misreading it, for automatically equating failing to appeal with failing to render effective assistance of counsel would do great damage to our recent en banc decision in *Spurlark*. It is true that the precise issue there was the slightly different one of a defendant's failing to in-

clude in his state-court appeal grounds that he later tried to raise in a habeas corpus action in federal court. I assume my brethren would not think it incompetence per se for a lawyer who had taken an appeal for his client not to include every possibly meritorious ground in the appeal; the lawyer might have made a professionally sound judgment that his chances of winning would be greater if he limited his appeal to his best grounds. But nothing in *Spurlark* suggests that that decision should be Limited to cases in which an appeal is filed but some grounds for appeal are omitted—quite the contrary, see 699 F.2d at 359-61. In any event the extension of *Spurlark* to the case where the lawyer fails to appeal at all—if extension it be—was taken in *Williams v. Duckworth*, 724 F.2d 1439, 1443 (7th Cir. 1983); see also *United States v. Correa-De Jesus*, 708 F.2d 1283, 1285 (7th Cir. 1983) (dictum). Contra, *Holcomb v. Murphy*, 701 F.2d 1307, 1310-12 (10th Cir. 1983). *Williams* would be unfathomable if the court had thought that not appealing an appealable judgment is always and everywhere the infallible sign of lawyer incompetence. Then the defendant could always show good cause—the incompetence of his counsel—for failing to appeal his conviction to a state appellate court, and the failure to take such an appeal could never bar a defendant from seeking federal habeas corpus.

The idea that failure to appeal is ineffective assistance of counsel per se not only guts *Spurlark* as elaborated in *Williams*, but is wrong on its own terms. If an appeal would be futile, the failure to appeal is not a sign of incompetence. This is such a case. *Williams* gives another example: forgoing an appeal because of a recent and dispositive adverse precedent in the state supreme court. See 724 F.2d at 1443 n. 5.

Even though Elson acted reasonably throughout, Miss Clay has demonstrated good cause for not having pursued her state appellate remedies—which is why I concur in the majority's result. The combination of Friedman's incompetence with the inconsistent signals given by the two state judges made it impossible (or virtually so) for her

to pursue her appellate remedies (remedies that in any event Friedman's incompetence made unlikely to succeed despite the great substantive merit of her constitutional claims) without giving up what seemed a better remedy in the trial court—a hearing on the amended motion to vacate. True, the mere fact that making an objection seems futile on the basis of existing state-court precedents does not in itself establish good cause for failing to make it, *Engle v. Isaac*, 456 U.S. 107, 130 (1982), and I shall assume that the same principle applies to taking an appeal. But the principle has reference to cases where there is no great cost to making the objection or taking an appeal. If Elson had taken a futile appeal, he would have given up something worth more to his client: a hearing that a state judge had offered him, at which he would be able to present the evidence essential to show that his client had been wronged. As Elson has established good cause for failing to pursue state appellate remedies, and there is no doubt that denying Miss Clay access to fedeal habeas corpus would do her great prejudice, the judgment of the district court must be reversed and the case remanded for a consideration—at long last—of the merits of her constitutional claims. But there is no need for us to embrace the factually and legally unfounded proposition that a decision not to appeal and appealable judgment is conclusive proof of incompetence of counsel.

BAUER, *Circuit Judge*, specially concurring. I do not share Judge Posner's fear that the majority opinion might be construed to mean that *any* failure to appeal an appealable judgment would be incompetence per se. Elson himself raised the question of his incompetence and asked that this issue be heard. It is only in the context of the very peculiar facts of this case that the failure to appeal was a final nail in the legal coffin of his client's case. Filing an amended motion to vacate when Illinois makes "no specific provision for such an animal" and urging upon the court a hearing on that peculiar animal is not a sub-

stitute for filing an appeal when a relatively obvious miscarriage of justice has occurred. Imaginative pleadings, however commendable, do not add to the time for a proper appeal. The fact that one judge would have provided a vehicle for hearing the imaginative motion and another, successor judge, would not, does not make the failure to appeal more sound; it may provide a *reason* for the failure but scarcely an excuse. Imagination is simply not a substitute for sound legal judgment.

Finally, I would commend Elson for his frank statement that he made a mistake. To rely on a judge's agreement to hear and rule on a motion filed without any precedent or standing is not just a "long shot"—it is risk-taking at the expense of a client who had already suffered from legal advice that seemed to have failed to grasp the handle of legal reality. Elson may be more to be pitied than censured—he was undoubtedly doing his best to untangle a knotty problem not of his doing—but the opinion simply accepts what he himself has urged upon this court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IVIE CLAY,

Petitioner,

No. 79 C 1491 v.

DIRECTOR, JUVENILE DIVISION, ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

MEMORANDUM OPINION AND ORDER

Ivie Clay ("Clay") filed a habeas corpus petition against the Director of the Juvenile Division ("Director") of the State of Illinois Department of Corrections ("Department"), advancing several grounds for relief:

1. Her guilty plea was involuntary because she (a) was ignorant of available defenses and (b) misunderstood the terms of her plea agreement.

2. She received inadequate representation from Assistant Public Defenders Roger Harris ("Harris") and Saul Friedman ("Friedman") both when she pleaded guilty and in connection with her motion to vacate the guilty plea.

3. Denial of the motion to vacate deprived Clay of due process because she was unconditionally entitled, according to the trial court's own representa-

tions, to withdraw her plea if her sentence did not accord with the plea agreement.

On May 11, 1983 this Court granted Director's motion for summary judgment (564 F.Supp. 206, the "Opinion"). Clay now moves for reconsideration of that ruling pursuant to Fed. R. Civ. P. ("Rule") 59(e). For the reasons stated in this memorandum opinion and order, Clay's motion is denied.

Facts[1]

In August 1977 Clay (then 15 years old) was arrested for aggravated assault and charged with delinquency. Because of Clay's indigency, Friedman was appointed as her counsel. Friedman urged her to enter into a plea agreement and plead guilty, failing to apprise her of the availability of certain legal defenses to the charge against her. Clay followed his recommendation on the mistaken understanding her plea agreement foreclosed any possibility of actual commitment.

On September 28, 1977 Clay admitted her guilt before Cook County Circuit Court Judge Rogers. After Clay acknowledged her guilty plea had been induced by a plea agreement, Judge Rogers advised her of her constitutional right to withdraw the admission if he refused to accept the agreement. On October 26, 1977 Judge Rogers found Clay guilty of delinquency and committed her to Department. Even though that sentence represented a rejection of Clay's version of the plea agreement, Friedman neither moved to withdraw her admission nor informed her of her right to do so.

Convinced Friedman had bungled the case, Clay's mother immediately telephoned Assistant Director John Elson ("Elson") of the Northwestern University Legal Clinic (the "Clinic")—Clay's counsel in this habeas

[1] This brief factual recitation plagiarizes freely from the considerably more detailed account presented in the Opinion.

proceeding—for help. Elson called Friedman the next day, apprising him of Mrs. Clay's belief her daughter has been misinformed that her admission of guilt could not lead to commitment. Friedman apparently agreed with that assessment and said he would file a motion to vacate her guilty plea.

On November 22 (within the prescribed 30 day period) Friedman filed the motion to vacate, using a standard printed form with blanks for the name of the "respondent" (in this case Clay). Needless to say, the form was seriously deficient as a presentation of Clay's specific basis for relief. It merely advanced very generalized grounds for vacating the plea, none of which really encompassed Clay's present habeas claims. On February 24, 1978 Judge Rogers held a hearing on the motion to vacate. Instead of arguing the motion himself, Friedman arranged for Harris, another Assistant Public Defender, to attend the hearing. Because Harris was totally unfamiliar with the case, he declined to present any argument in support of the motion. Not surprisingly, Judge Rogers denied the motion.

Though not then aware of the February 24 hearing and its outcome, Elson learned in early March that no progress had been made in the Clay matter. Consequently Elson changed his earlier position declining direct representation of Clay. On March 10 he filed (1) a petition to substitute himself and a Northwestern law student for the Public Defender's Office as Clay's counsel and (2) an amended motion to vacate the guilty plea. On March 16 Elson entered an appearance in the case. Shortly thereafter Elson appeared before Judge White to argue the amended motion. Judge White reset the motion for April 28 before Judge Rogers, who was then on vacation. On March 26 the 30-day period for an appeal from the denial of the original motion to vacate lapsed.

At the April 28 hearing Judge Rogers refused to entertain the motion, primarily on grounds of untimeliness: It was not filed within 30 days of the October 26 order of

commitment. Believing the state procedural rule invoked by Judge Rogers foreclosed any other state remedies, Elson filed this habeas petition on Clay's behalf.

The Opinion

In granting Director's summary judgment motion, the Opinion concluded the "waiver" principles of *Wainwright v. Sykes*, 433 U.S. 72 (1976) barred consideration of Clay's habeas claims. That conclusion hinged on the affirmative resolution of two questions:

> 1. Was Clay free, on direct appeal from denial of the *original* motion to vacate, to assert the claims now advanced in this habeas proceeding—even though they had not been presented to the trial court in that original motion?
>
> 2. If so, did Clay forfeit her federal habeas remedy under the *Wainwright* cause-prejudice test by failing to take such a direct appeal?

As for the first question, the Opinion (564 F.Supp. at 211) found Illinois case law would have permitted appellate review of all three habeas claims:

> 1. Because Friedman's post-trial motion would not have been expected to impugn his own competency at Clay's initial admission-of-guilt hearing, that claim could have been pursued for the first time on appeal. *People v. Harrawood*, 66 Ill.App.3d 163, 167, 383 N.E.2d 707, 709 (5th Dist. 1978); *People v. Pendleton*, 52 Ill.App.3d 241, 244-45, 367 N.E.2d 196, 199 (1st Dist. 1977).
>
> 2. That same analysis would permit assertion of the other two habeas claims on appeal. They too could be said to have been omitted from the motion to vacate as a result of the incompetence of Clay's appointed counsel and thus "would not normally be expected to be included in a post trial motion." *Harrawood*, 66 Ill.App.3d at 167, 383 N.E.2d at 709. *Accord, People v. Rhodes*, 71 Ill.App.2d 150, 151, 217

> N.E.2d 123, 124 (4th Dist. 1966) (counsel's failure to object to admissibility of evidence did not waive issue because that failure was allegedly caused by his incompetence).

In a footnote to that second point, the Opinion (564 F.Supp. at 211 n.16) observed:

> Nor would disposition of those two claims on appeal have breached the general rule against entertaining non-record matters. Both claims draw on the same factual matrix that bounds the ineffective assistance claim, resolution of which generally requires supplementation of the record. Consequently the "plain error" doctrine would permit an appellate court to view any new evidence introduced in support of the incompetent counsel claim as probative of the other two claims as well. *See People v. Baynes*, 88 Ill.2d 225, 231, 430 N.E.2d 1070, 1072-73 (1981) (plain error doctrine stays application of waiver rule where record discloses error affecting defendant's substantial rights).

As for the second question, the Opinion concluded Clay had not satisfied the "cause" branch of *Wainwright*'s cause-prejudice standard. This Court reasoned (564 F.Supp. at 213) current waiver doctrine (as reflected in *Engle v. Isaac*, 456 U.S. 107, 130-31 (1982) and *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-61 (7th Cir. 1983)) categorically rejects the only proffered justification for Clay's failure to appeal—the futility of convincing the Illinois Appellate Court to uphold her habeas claims.

Motion for Reconsideration

Clay's current motion advances two arguments:

> 1. Elson's decision to file an amended motion to vacate rather than appeal the denial of the original motion to vacate reflected ineffective assistance of counsel. Such incompetence supplies the requisite

"cause" for Clay's procedural default under the *Wainwright* formulation.

2. This Court erroneously found (564 F.Supp. at 211 & n.16) the Illinois Appellate Courts would have entertained any non-record evidentiary support for the three habeas claims, because (a) a proceeding under the Post-Conviction Proceeding Act ("Post-Conviction" proceeding), Ill. Rev. Stat. §§122-1 to 122-7, rather than a direct appeal, is the only forum for raising such non-record matters and (b) juveniles like Clay cannot seek post-conviction relief.

Either of those contentions would, if successful, undercut the Opinion.

Clay's first argument essentially represents a new legal theory based on "new" evidence actually available and known to Clay when Director originally filed his summary judgment motion. Well aware the reason for her failure to appeal was a critical issue raised by that motion, Clay (through her counsel, Elson) deliberately chose to proffer the futility rationale as the sole justification for her procedural default. For the reasons set forth in *Keene Corp. v. International Fidelity Insurance Co.*, 561 F.Supp. 656, 665 (N.D. Ill. 1982), this Court will not permit Clay to inject her new argument into the litigation at this late date by way of Rule 59:

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. *See Evans, Inc. v. Tiffany & Co.*, 416 F.Supp. 224, 244 (N.D. Ill. 1976). Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. *See Walker v. Hoffman*, 583 F.2d 1073, 1075 (9th Cir. 1978), quoting *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972): The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment:

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

Accord W.A. Krueger Co. v. Northern Trust Co., No. 81 C 6064, slip op. at 7 n.7 (N.D. Ill. Jan. 7, 1983) ("a litigant cannot 'hold back' evidence on a summary judgment motion"). Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time. *Evans*, 416 F.Supp. at 244.

Clay's second argument is flawed at two levels:

1. By taking a direct appeal, Clay could have secured review of the full evidentiary basis (including non-record evidence) for her habeas claims—at least by the trial court on remand. Under Illinois Supreme Court Rule 604(d) ("Rule 604(d)"), Ill. Rev. Stat. ch. 110a, §604, a juvenile defendant (like an adult) may challenge the voluntariness of his or her guilty plea on direct appeal if he or she filed (as Clay did) a motion to vacate the plea within 30 days of the sentencing date. See *In re Buchanan*, 62 Ill.App.3d 463, 465-66, 379 N.E.2d 122, 124 (1st Dist. 1978). Rule 604(d) generally bars appellate review of any issue not raised in the motion to vacate. But that waiver rule is inapplicable where, as Clay asserts here, the omission of issues resulted from the incompetence of defendant's counsel. See *People v. Porter*, 61 Ill.App.3d 941, 946, 378 N.E.2d 788, 791 (4th Dist. 1978). Under such circumstances the Illinois Appellate Court would either (a) rule on those claims itself if their resolution does not require further factual development (see, e.g., *Porter*, 61 Ill.App.3d at 946, 378 N.E.2d at 791) or (b) as would have occurred in Clay's situation, remand for a rehearing (at which new evidence could be introduced) on the motion to

vacate (see, e.g., *People v. Norris*, 46 Ill.App.3d 536, 542, 361 N.E.2d 105, 110 (1st Dist. 1977) (reversing denial of motion to vacate because defendant received inadequate representation and allowing trial court to hold evidentiary hearing if warranted by the motion's allegations)).[2]

2. Even were it assumed arguendo (despite the compelling authority just cited) a direct appeal would not have afforded the opportunity to supplement the record (either directly on appeal or indirectly on remand), Clay could have presented the non-record evidentiary foundation for her habeas claims by filing a petition for relief from judgment under Ill. Rev.

---

[2] Clay relies solely on *People v. Morris*, 3 Ill.2d 437, 445-46, 121 N.E.2d 810, 815-16 (1954) (citations omitted) to establish the futility of appeal as a means to obtain review of the non-record underpinnings of her habeas claims:

> It is to be noted that in reviewing a case on writ of error the court does not consider facts outside the trial court's record; hence, in many of the Illinois cases cited above the matter of the competency of counsel has been treated rather summarily, there being nothing in the record to show the alleged incompetency or any prejudice resulting therefrom. . . . In a proceeding under the Post-Conviction Hearing Act, however, the court may receive proof by affidavits, depositions, oral testimony or other evidence which relates to an alleged deprivation of a constitutional right.

But that passage does not undercut this opinion's analysis:

1. That 30-year-old decision hardly provides as accurate a portrayal of current appellate practice as the very recent authority cited in the text.

2. *Morris* concerned the scope of review in criminal cases that actually went to trial and hence has little bearing on appellate treatment of claims raised by defendants who pleaded guilty—a specialized area governed by Rule 604(d), which was adopted long after *Morris* was decided.

3. Most importantly, *Morris* does not deny the appellate court's willingness and authority to remand criminal cases to the trial court for a full evidentiary hearing on claims based on non-record facts.

Stat. ch. 110, §2-1401 ("Section 2-1401," formerly Ill. Rev. Stat. ch. 110, §72). That method of collateral attack is distinct from a post-conviction proceeding (see, e.g., *People v. Yarbar*, 43 Ill.App.3d 668, 670, 357 N.E.2d 166, 168-69 (1st Dist. 1976)), and, unlike the latter remedy, is available to juveniles such as Clay (see *Joseph A. Thorsen Realtors v. Werner*, 28 Ill.App.3d 670, 329 N.E.2d 365 (1st Dist. 1975)). Section 2-1401 is specifically designed to permit judicial review of claims based on extra-record "facts which, had they been known at the time judgment was rendered, would have prevented its rendition." *People v. Hilliard*, 65 Ill.App.3d 642, 645, 382 N.E.2d 441, 444 (1st Dist. 1978). And the Illinois Appellate Court whose decisions have greatest force for this Court has recognized the availability of Section 2-1401 relief on the basis of allegations remarkably similar to Clay's habeas claims: In response to a Section 72 petition asserting defendant's guilty plea was induced by a mistaken understanding as to the terms of the plea agreement, *People v. Martinez*, 14 Ill.App.3d 775, 303 N.E.2d 442 (1st Dist. 1973) remanded the case for an evidentiary hearing because "justice would best be served" by such a reopened hearing. In the present case Clay, having failed to file a Section 2-1401 motion within the prescribed period (between 30 days and two years after the entry of judgment), waived that state remedy. Because no "cause" in *Wainwright* terms has been demonstrated, that procedural default disqualifies Clay from seeking federal habeas relief.[3]

---

[3] Clay's original and amended motions to vacate were clearly brought under Rule 604(d), not Section 2-1401 as she now frivolously asserts:

> 1. As already noted, Rule 604(d) motions must be filed within 30 days after the sentence was imposed, while Section 2-1401 motions must be filed after that 30-day period. Because Clay's original motion to vacate was submitted within that

(Footnote continued on following page)

Conclusion

Clay's motion for reconsideration is denied.

/s/ Milton I. Shadur
United States District Judge

Date: September 13, 1983

---

[3] *continued*

30-day period, it could not possibly have been brought under Section 2-1401.

2. Nor did Clay intend to ground the amended motion to vacate on Section 2-1401. As will be recalled, Judge Rogers dismissed that amended motion because it was not filed within 30 days of Clay's commitment—that time period prescribed for Rule 604(d) motions. Had the motion been brought under Section 2-1401, that ground for dismissal would have been plainly inapplicable. Consequently, the failure of Clay's counsel to point that out to Judge Rogers confirms Section 2-1401 was never intended as the predicate for the amended motion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IVIE CLAY,

Petitioner,

No. 79 C 1491 v.

DIRECTOR, JUVENILE DIVISION, ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

MEMORANDUM OPINION AND ORDER

Ivie Clay ("Clay") has filed a habeas corpus petition against the Director of the Juvenile Division ("Director") of the State of Illinois Department of Corrections ("Department").[1] Clay advances several grounds for relief:

1. Her guilty plea was involuntary because she (a) was ignorant of available defenses and (b) misunderstood the terms of her plea agreement.

2. She received inadequate representation from Assistant Public Defenders Roger Harris ("Harris")

[1] When Clay first brought this habeas action, she was on parole from a commitment to Department until her twenty-first birthday. Then on July 2, 1979 she received a final discharge from the Department. That discharge does not moot this litigation, for Clay still suffers a serious "collateral consequence" of her delinquency adjudication: the potential for harsher sentencing on any future conviction. *See* Feb. 25, 1981 Memorandum Opinion and Order.

and Saul Friedman ("Friedman") both when she pleaded guilty and in connection with her motion to vacate the guilty plea.

3. Denial of the motion to vacate deprived Clay of due process because she was unconditionally entitled, according to the trial court's own representations, to withdraw her plea if her sentence did not accord with the plea agreement.

Director now moves for summary judgment under Fed. R. Civ. P. ("Rule") 56.[2] For the reasons stated in this memorandum opinion and order, Director's motion is granted.

Facts

On August 8, 1977 Clay (then 15 years old) was arrested for aggravated assault and charged with delinquency. Because of Clay's indigency, Friedman was appointed as her counsel. At the initial interview Clay disclosed facts that might have established certain legal defenses to the charge against her. But Friedman did not apprise her of the availability of such defenses. Instead he urged her to enter into a plea agreement and plead guilty.

Unaware of any other option, Clay followed that recommendation on the understanding her plea agreement foreclosed any possibility of actual commitment. But that belief was apparently mistaken, for both Friedman and the Assistant State's Attorney handling the case have stated by affidavit that their only agreement was to amend the Complaint to read that the weapon used was a knife rather than a gun.[3]

---

[2] This Court first received this case on remand from our Court of Appeals' reversal of an earlier dismissal of Clay's petition, 631 F.2d 516 (7th Cir. 1980). This opinion later deals with the impact of that earlier determination on the current issues.

[3] Because that amendment merely rectified a clerical error (and thus reflected the undisputed facts), Clay derived no benefit from the agreement.

On September 28, 1977 Clay admitted her guilt before Cook County Circuit Court Judge Rogers. After Clay acknowledged her guilty plea had been induced by a plea agreement, Judge Rogers advised her of her unconditional right to withdraw the admission if he refused to accept the agreement. On October 26, 1977 Judge Rogers found Clay guilty of delinquency and committed her to Department. Even though that sentence represented a rejection of Clay's version of the plea bargain, Friedman neither moved to withdraw her admission nor informed her of her right to do so.

Convinced that Friedman had bungled the case, Clay's mother Ina immediately telephoned Assistant Director John Elson ("Elson") of the Northwestern University Legal Clinic (the "Clinic") for help.[4] Ina Clay Dep. 126. She told Elson her daughter had been promised probation in return for her guilty plea and Friedman "had sold her down the river." Elson Dep. 67-69.[5] Elson told Mrs. Clay he was too busy to represent her daughter but offered to consult with Friedman and "see if he would do anything about it." Elson Dep. 61. Mrs. Clay agreed. *Id.*

Elson called Friedman the next day, apprising him of Mrs. Clay's belief her daughter had been misinformed that her admission of guilt could not lead to commitment. Friedman apparently agreed with that assessment, acknowledging "there was a real problem with what Ivie Clay understood." Elson Dep. 86. Friedman said he would file a motion to vacate her guilty plea, assuring Elson "he didn't think there would be a big problem with the matter." Elson Dep. 87-88.

---

[4] Apparently Elson and the Clinic had previously represented Mrs. Clay and other family members. Elson Dep. 62. Elson is now acting as Clay's counsel in the habeas proceeding.

[5] Elson is not "absolutely" certain whether the "down the river" remark was made during that or a later conversation with Mrs. Clay. Elson Dep. 68-69.

On November 4, 1977 Friedman called Elson to give him a general status report. Friedman said "he was processing the papers on the case and would have them done shortly and have the transcript typed up." Elson Dep. 76. On November 22 (within the prescribed 30-day period) Friedman filed the motion to vacate, using a standard printed form with blanks for the name of the "respondent" (in this case Clay). Needless to say, the form was seriously deficient as a presentation of Clay's specific basis for relief:

> 1. It refers to respondent Clay throughout as a male.
>
> 2. It advances very generalized grounds for vacating the plea, none of which really encompassed Clay's present habeas claims (this is a literal transcription of the form, warts and all):
>
> > 4. That the minor respondent did not fully comprehend the significance of his admission.
> >
> > 5. That the minor respondent was not admonished in his admission, in that there was no affirmative showing that the court informed the minor respondent and determined that said minor understood.
> >
> > > (a) the nature of the charge
> > >
> > > (b) the penalties the minor may be subjected to upon his admission to the offense, including commitment to the Department of Corrections until the age of twenty-one
> > >
> > > (c) that the minor respondent has a right not to enter an admission or to persist in that admission if it has already been made
> > >
> > > (d) if the minor respondent enters an admission there will not be a trial of any kind and that by so admitting the offenses he waives the right to a trial and the right to be confronted with the witnesses against him.

6. That the minor respondent now urges that his admission was induced by coercion of the police and/or their agents, by the use of force, threats or promises.

7. That the minor respondent now urges that his admission was induced by the use of illegally obtained evidence.

8. That the court failed to determine first when accepting the minor's admission whether there was an agreement and if there was said agreement said court failed to inquire as to the terms of this agreement.

9. The court failed to determine a factual basis for the admission when it entered a final judgment on the minor respondent's admission.

10. The court failed to admonish the minor respondent in accordance with the provisions of Supreme Court Rule 605.

3. It failed to identify the most compelling basis for relief: Judge Rogers' statement that Clay had the absolute right to withdraw her guilty admission if he refused to honor the plea agreement, coupled with Clay's specific understanding no commitment would be imposed.[6]

---

[6] Paragraphs 4 and 5(b) of the form's boilerplate assertions might be argued to embrace Clay's involuntary plea claim. But that could only be said fairly if the boilerplate were buttressed by specific factual allegations. And as the text of this opinion reflects, no such support was provided either in writing or orally. Indeed the very use of a standardized form creates a climate in which the court is likely to view the Public Defender as simply going through the motions, depreciating the seriousness and force of the individual's claim. If it were really necessary (due to secretarial burdens or otherwise) to resort to a form, at a minimum we might expect one in which the truly applicable grounds were to be checked off and space was left for *some* elaboration. As matters stand, the presence of such wholly inapplicable matters as Paragraphs 6, 7 and 9 (for example) must lessen the prospect the *real* claims will be heeded.

On February 24, 1978 Judge Rogers held a hearing on the motion to vacate. Instead of arguing the motion himself, Friedman arranged for Harris, another Assistant Public Defender, to attend the hearing. Because Harris was totally unfamiliar with the case, he declined to present any argument in support of the motion. Nor was any effort made to secure Clay's presence at the hearing or to inform her or her mother about the motion.[7] Not surprisingly, Judge Rogers denied the motion.

Though not then aware of the February 24 hearing and its outcome,[8] Elson learned in early March that "nothing had happened" on the Clay matter.[9] Elson Dep. 110. Consequently Elson changed his earlier position declining direct representation of Clay. On March 10 he filed (1) a petition to substitute himself and Bak (a Certified Senior Law Student) for the Public Defender's Office as Clay's counsel and (2) an amended motion to vacate judgment. On March 16 Elson entered an appearance in the case.[10]

---

[7] Indeed, neither Clay nor her mother was apprised of any continued involvement of the Public Defender's Office after the October 26, 1977 delinquency adjudication.

[8] During December 1977 or January 1978 Elson had a chance encounter with Friedman at the Juvenile Court—their last contact before Elson filed his appearance in open court March 16 (with Friedman present). During that earlier brief conversation Friedman told Elson in general terms "that matters were progressing, that things were going along." Elson Dep. 79.

[9] That information stemmed from a contact between Clay or her mother on the one hand and Elson or Northwestern student and Clinic participant Patricia Bak ("Bak") on the other. Elson Dep. 114.

[10] There is a sharp dispute as to whether Elson's (and the Clinic's) representation of Clay began any earlier than March 1978. Evidence on that score is conflicting. On the one hand Elson expressly declined to serve as Clay's counsel during his October 26, 1977 conversation with Clay's mother and had minimal contact with both Clay and the mother during the period in question. On the other hand the actions of other Clinic representatives (and

(Footnote continued on following page)

Elson's amended motion asserted only two grounds for relief (quoted verbatim from the motion):

> 4. That in admitting certain of the allegations made against her, IVIE CLAY did not understand that the Court would construe such admissions as an admission of having committed a delinquent act.
>
> 5. That Respondent never intended to waive her defenses of self-defense and defense of her family from imminent life threatening harm.

No mention was made of Harris and Friedman's incompetent representation, apparently because Elson had not yet seen the original motion to vacate or learned of the manner in which it had been presented at the February 24 hearing. Elson learned of those developments when he appeared before Judge White to argue the amended motion. Elson Dep. 80. At that time (a date that cannot be gleaned from the record) Judge White reset the motion for April 28 before Judge Rogers, who was then on vacation. At Elson's request Judge White directed the court reporter to prepare a transcript of the February 24 pro-

---

[10] *continued*

perhaps Elson as well) suggest a different pre-March 1978 relationship between the Clinic and Clay:

> 1. Elson himself had informed Friedman of possible grounds for vacating Clay's admission and kept abreast of the representation provided by the Public Defender's Office.
>
> 2. Shortly after her initial talk with Elson, Mrs. Clay (apparently on her own initiative) had a personal interview with some Clinic participant, who left her with the impression she had retained the Clinic. Ina Clay Dep. 126-28.
>
> 3. Before March 1978 Bak (as a Clinic representative authorized to do so by Elson) met with Clay on several occasions. Though those discussions centered on other unrelated matters, Bak also asked about the delinquency proceedings. Elson Dep. 65-66, 94-95.

On this summary judgment motion, the disputed fact issue is resolved against Director, and Elson's representation is considered to have begun in mid-March 1978.

ceedings. On March 26 the 30 day period for an appeal from the denial of the original motion to vacate elapsed.

At the April 28 hearing Elson (having familiarized himself with Friedman's and Harris' conduct on Clay's behalf) urged ineffective assistance of counsel as a basis for considering the amended motion and vacating Clay's delinquency adjudication. *See* April 28, 1978 Report of Proceedings 11. Judge Rogers refused to entertain the motion, primarily on grounds of untimeliness: It was not filed within 30 days of the October 26 order of commitment.[11] Believing the state procedural rule invoked by Judge Rogers foreclosed any other state remedies, Elson filed this habeas petition on Clay's behalf.

Summary Judgment Motion

Director's summary judgment motion urges the "waiver" principles of *Wainwright v. Sykes*, 433 U.S. 72 (1976) bar consideration of Clay's habeas claims.[12] Under *Wainwright* a state prisoner who fails to satisfy state procedural requirements for judicial review of an issue cannot raise that issue in a federal habeas proceeding unless he shows good cause for and prejudice from his procedural default.[13] Director's waiver contention therefore entails a two-step inquiry:

---

[11] As a secondary ground for rejection of the motion, Judge Rogers noted res judicata principles precluded relitigation of claims that could have been raised in the previously-denied motion to vacate.

[12] Though seeking summary judgment as to all Clay's habeas claims, Director's motion refers only to the ineffective assistance of counsel claims. Nevertheless, because all those habeas claims call for the same waiver analysis, this Court will treat Director's motion as a Rule 56 challenge to Clay's entire petition.

[13] Post-*Wainwright* case law emphasizes the importance of comity: *Wainwright*'s waiver doctrine is designed to afford state courts (presumed to be just as solicitous of federal constitutional values as federal courts) an adequate opportunity to rectify any constitutional defects in their criminal proceedings. *See Engle v. Isaac*,

(Footnote continued on following page)

1. Was Clay free, on a direct appeal from denial of the *original* motion to vacate, to assert the claims now advanced in this habeas proceeding—even though they had not been presented to the trial court in that original motion?

2. If so, did Clay forfeit her federal habeas remedy under the *Wainwright* cause-prejudice test by failing to take such a direct appeal?[14]

As for the first question, Illinois case law confirms the availability of appellate review of all three habeas claims:[15]

---

[13] *continued*
102 S.Ct. 1558, 1572 (1982); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir. 1983). Waiver concepts come into play when the petitioner has already "exhausted" his state remedies by eschewing an earlier opportunity to secure state court review of a federal constitutional claim. Thus the doctrine should be distinguished from the exhaustion requirement of 28 U.S.C. §2254(b). Though also grounded on comity considerations, the latter statutory mandate contemplates exhaustion of any *presently* available state remedies. *Perry v. Fairman*, Nos. 81-2479, 82-1630, slip op. at 2-3 (7th Cir. Mar. 16, 1983).

[14] This section of this opinion holds the failure of Clay's Assistant Public Defender counsel to present these issues to the trial court did not foreclose Elson from raising the same issues for the first time on appeal. For that reason the waiver implications of the *Friedman-Harris* lapse itself need not be assessed. Because the parties have nonetheless concentrated on that waiver issue, two general comments may be in order:

1. Clay may assert her former counsel's incompetence as cause for the failure to advance her claims at the state trial court level. *See Norris v. United States*, 687 F.2d 899, 903 (7th Cir. 1982).

2. Clay did not waive that point by neglecting to present it on direct appeal. *Wainwright*'s waiver doctrine is confined to the underlying habeas claims and is inapplicable to arguments bearing only on the cause-prejudice inquiry.

[15] Clay's charge of ineffective assistance on the motion to vacate cannot be regarded as a fourth habeas claim. If meritorious, that contention would not invalidate the delinquency adjudication (the only relief available in this habeas proceeding). Instead it would

(Footnote continued on following page)

1. Because Friedman's post-trial motion would not have been expected to impugn his own competency at Clay's initial admission-of-guilt hearing, that claim could have been pursued for the first time on appeal. *People v. Harrawood*, 66 Ill.App.3d 163, 167, 383 N.E.2d 707, 709 (5th Dist. 1978); *People v. Pendleton*, 52 Ill.App.3d 241, 244-45, 367 N.E.2d 196, 199 (1st Dist. 1977).

2. That same analysis would permit assertion of the other two habeas claims on appeal. They too could be said to have been omitted from the motion to vacate as a result of the incompetence of Clay's appointed counsel and thus "would not normally be expected to be included in a post trial motion." *Harrawood*, 66 Ill.App.3d at 167, 383 N.E.2d at 709. *Accord*, *People v. Rhodes*, 71 Ill.App.2d 150, 151, 217 N.E.2d 123, 124 (4th Dist. 1966) (counsel's failure to object to admissibility of evidence did not waive issue because that failure was allegedly caused by his incompetence).[16]

Moreover, nothing in the record before this Court indicates Elson was not retained in sufficient time to prepare such an appeal. As his filing of the March 10

---

[15] *continued*
merely accord another hearing on the motion to vacate. By contrast, Clay's charge of incompetency at the admission hearing does implicate the delinquency finding itself and therefore qualifies as a habeas claim.

[16] Nor would disposition of those two claims on appeal have breached the general rule against entertaining non-record matters. Both claims draw on the same factual matrix that bounds the ineffective assistance claim, resolution of which generally requires supplementation of the record. Consequently the "plain error" doctrine would permit an appellate court to view any new evidence introduced in support of the incompetent counsel claim as probative of the other two claims as well. *See People v. Baynes*, 88 Ill.2d 225, 231, 430 N.E.2d 1070, 1072-73 (1981) (plain error doctine stays application of waiver rule where record discloses error affecting defendant's substantial rights).

amended motion to vacate confirms, Elson began representing Clay more than two weeks before expiration of the appeal period from denial of the original motion to vacate.[17]

Under the circumstances, then, Clay's failure to appeal deprived the state courts of an opportunity to evaluate Clay's habeas claims.[18] That procedural default is fatal to those claims unless *Wainwright*'s conjunctive requirements of cause and prejudice are met. *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-61 (7th Cir. 1983) (extending *Wainwright*'s cause-prejudice standard to failure-to-appeal cases).

As for the "cause" prong, Clay asserts she was not required to raise the issues on appeal because it would have

---

[17] Admittedly Elson was unaware the original motion had been denied when he filed the amended motion. But Clay has made neither a showing nor even a claim Elson had not learned of the disposition of the original motion (or the fact it was incompetently presented) *before* the time for appeal from that disposition had elapsed (some two weeks after the filing of his amended motion). Clay's recently-filed Supp. Mem. at 3 appears to skirt the issue carefully. Now Elson has just asked leave to file a transcript of the March 16, 1978 hearing on the amended motion, to show denial of the original motion to vacate was not specifically mentioned. As that new motion points out, Elson had access to the Juvenile Court file once he substituted for Friedman March 16—and the half sheet in the Juvenile Court case specifically shows the original motion had been denied February 24, 1978. That put Elson on notice of the availability of the appeal remedy—and that availability, not the mistaken belief the amended motion would be heard de novo, is the critical fact. Elson's decision to pursue the amended motion really has the look of a strategic decision, which cannot of course be the basis for a second-guess habeas petition.

[18] That conclusion is not altered by Elson's untimely effort to present the habeas issues in an amended motion to vacate. Because the amended motion was rejected on purely procedural grounds, the state courts did not have the chance to address the substantive claims.

been futile to do so.[19] In fact she argues law of the case principles compel this Court's acceptance of that contention, for the 1980 Seventh Circuit opinion that remanded the case to this Court held futility was a sufficient cause to suspend operation of the waiver doctrine, 631 F.2d 516, 523 (7th Cir. 1980):

> The State has argued that any infirmities in the level of advocacy petitioner received in conjunction with the motion to vacate were somehow cured by the fact that petitioner retained present counsel seven days before the expiration of the period allowed for appealing the denial of the motion. We do not agree. Under Illinois law, a motion to vacate a guilty plea is addressed to the discretion of the trial court, and an appellate court may not reverse the denial of the motion except upon a showing of an abuse of discretion. *People v. Walston*, 38 Ill.2d 39, 230 N.E.2d 233 (1967). Given the general grounds in the motion, and the fact that no argument was presented in the trial court, there would have been no basis on which the appellate court could have reversed. For the same reason, we reject the State's contention that the failure to take an appeal was a deliberate bypass of state remedies, which constituted a waiver for purposes of federal habeas relief.

Two considerations lead this Court to a different conclusion:

1. Law of the case does not operate here.

2. Under the present state of the law, waiver *does* bar Clay's claim.

Those issues will be treated in turn.

---

[19] Illinois appellate courts apply a stringent abuse of discretion standard in reviewing a trial court's denial of a motion to vacate. Except for the inadequate representation issue (which was of course not presented to the trial court at all), Clay would not have surmounted that test on appeal from denial of her original motion. See the Court of Appeals' discussion on the prior appeal in this case, quoted later in this paragraph of the text.

As for law of the case, later Seventh Circuit and Supreme Court pronouncements have jettisoned the waiver principles on which the just-quoted language rested:

> 1. That language analyzed the problem under the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391, 438 (1963).
>
> 2. This year's decision in *Spurlark* requires application of *Wainwright*'s cause-prejudice test in lieu of *Fay*'s more forgiving "deliberate bypass" standard in determining whether a petitioner forfeits habeas relief by failing to take a direct appeal.
>
> 3. *Engle*, 102 S.Ct. at 1572-73 teaches that a belief it will be futile to try to convince a state court to uphold a constitutional claim does not excuse the procedural default.[20]

Consequently this Court is free to reconsider the waiver issue in light of such subsequent legal developments.[21] *Morrow v. Dillard*, 580 F.2d 1284, 1294, 1297 (5th Cir. 1978) (law of case doctrine did not preclude District Court from reconsidering issue previously decided by Court of Appeals, because intervening Supreme Court decision

---

[20] In fact *Engle*, 102 S.Ct. at 1573 n.36 intimates the futility justification may not pass muster even under the "deliberate bypass" formulation:

> In fact, the decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay v. Noia*, 372 U.S. 391 (1963). Since the cause and prejudice standard is more demanding than *Fay*'s deliberate bypass requirement, see *Sykes, supra*, 433 U.S. at 87, we are confident that perceived futility alone cannot constitute cause.

[21] Law of the case constraints may also be inapposite for yet another reason. Our Court of Appeals' waiver analysis treated only Clay's contention that she received ineffective assistance in connection with her motion to vacate—and not her underlying habeas claims (which were not presented to the trial court because of the original counsel's incompetence).

superseded basis of Court of Appeals' decision); *cf. Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248-49 (2d Cir. 1979) (holding law of the case principles do not bind Court of Appeals to an earlier ruling undercut by a subsequent Supreme Court decision, but reserving judgment on whether a District Court is similarly unconstrained).

On the merits, the Illinois "abuse of discretion" doctrine holds that the trial court's rejection of issues *actually raised* (however incompetently) in a motion to vacate cannot be overturned except upon a showing of such abuse. That stringent standard of review would not have extended to any of Clay's habeas claims, which were never presented to the trial court at all. As already noted, an Illinois appellate court would have entertained those claims de novo because they concern either trial counsel's incompetence (at the admission hearing) or issues neglected as a result of counsel's imcompetence (at the post-admission proceeding).[22] And as *Spurlark* and *Engle*[23]

---

[22] Indeed, those issues concerning the involuntariness of Clay's guilty plea form the very core of the incompetence claim.

[23] Clay claims the relevance of *Engle* here is somehow undercut by the post-*Engle* footnote in *Mattes v. Gagnon*, 700 F.2d 1096, 1098-99 n.1 (7th Cir. 1983). *Mattes* there held an appeal from an adverse post-conviction ruling would have been "futile and, therefore, unnecessary to establish exhaustion." T[illegible]e factors effectively refute Clay's contention:

1. By definition *Mattes* cannot limit (though it may surely distinguish) *Engle*'s sweeping rejection of the futility justification as "cause" in a *Wainwright*-type waiver inquiry.

2. Unlike the *Mattes* petitioner (who at least gave the state courts one opportunity to entertain his claim), Clay never presented her habeas claims to any state court. Clay thus deprived the State of "a fair *opportunity* to address the federal constitutional issue[s]," *Mattes*, 700 F.2d at 1098 n.1, quoting *Toney v. Franzen*, 687 F.2d 1016, 1021 (7th Cir. 1982) (emphasis in original).

3. In *Mattes* the state trial court's denial of post-conviction relief (from which no appeal was taken) was based on a state Supreme Court decision squarely on point. By contrast, in the

(Footnote continued on following page)

together make plain, current waiver doctrine categorically rejects Clay's proffered justification for her failure to appeal. There was no "cause" in *Wainwright* terms. That procedural default therefore disqualifies Clay from seeking federal habeas relief.[24]

---

[23] *continued*

present case any belief by Clay's counsel in the futility of an appeal was grounded in a misperception of state law in that respect, together with the mistaken belief the amended motion to vacate would be heard de novo.

[24] Focusing only on the ineffective assistance claim, Director attempts to establish lack of "cause" by imputing to Elson the procedural default committed in the course of the original motion to vacate. Essentially Director argues Elson could and should have ensured the presentation of that habeas claim by either advising Friedman of it or preparing the motion himself. Elson's supposed ability and obligation to do so rests on two factual premises:

1. Elson (as well as Friedman) served as Clay's counsel at the time of the motion to vacate.

2. Elson know of Clay's ineffective assistance claim.

That argument is rejected, for it is both limited and flawed:

1. It does not at all implicate Clay's other two claims. Elson concededly notified Friedman of the involuntary plea claim. And there is no evidence as to Elson's awareness of the due process claim at that point.

2. Its factual predicates are disputed issues that cannot be resolved in Director's favor in this Rule 56 context.

3. Its underlying legal theory is also fundamentally defective. Regardless of Elson's status as Clay's co-counsel (sharply disputed), without question Friedman had the responsibility (communicated by Elson with Ina Clay's authorization) to present Clay's challenges in the motion to vacate. *Wainwright*'s cause inquiry must therefore focus on *Friedman*'s failure to raise the habeas issues. If Friedman's incompetence occasioned those omissions, that constitutes just cause. Entitled to presume Friedman's competence, Elson could reasonable expect Friedman to detect and assert those grounds for relief on his own. Of course, had Elson known in advance that Friedman would not raise these habeas claims, Elson's unwillingness to assist Friedman might then reflect a decision to withhold a constitutional claim, precluding any finding of cause. But neither Director nor the present record ascribes such foreknowledge to Elson.

Conclusion

There is no genuine issue of material fact, and Director is entitled to judgment as a matter of law. Director's motion for summary judgment is granted.

/s/ Milton I. Shadur
United States District Judge

Date: May 11, 1983